of a person standing upon the top of one of its cars, since the instruction took from the consideration of the jury the only fact of negligence upon which plaintiff relied; there being evidence tending to support his case.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 46, Trial, §§ 613-623.]

12. Master and Servant—Assumption of Risk.—In an action against a railway company for the death of a brakeman struck by an overhead bridge, instructions that if, though decedent knew, or ought to have known, that he could not pass in safety under the overhead bridge standing upon a box car or engine tender, he subjected himself to the danger, he was guilty of such contributory negligence as would bar recovery, and that, though the engineer gave a signal for the application of brakes, that fact did not relieve decedent from the duty to exercise ordinary care for his own safety, and that if decedent knew, or ought to have known, of the proximity of the bridge and its dangerous character, and went on top of the train just as he was approaching the bridge, he was guilty of contributory negligence, were properly refused, since under Code 1904, § 1294-k, knowledge by an employee of the defective character of structures, etc., does not of itself bar recovery for any injury caused thereby.

13. Same—Evidence—Sufficiency.—Evidence in an action against a railway company for the death of a brakeman struck by an overhead bridge held to sustain a verdict for plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 34, Master and Servant, §§ 950-996.]

14. Same—Res Ipsa Loquitur.—The res ipsa loquitur doctrine cannot be applied in favor of a railway company in an action for the death of a brakeman, where he started back over the train from the engine as the train approached an overhead bridge, and when next seen there was a contused wound upon the back of his head, and upon the sill of the bridge there appeared a stain or smear, such as might have been made by the violent impact of decedent's head.

LOUISVILLE & N. R. CO. *v.* INTERSTATE R. CO.

Sept. 10, 1908.

[62 S. E. 369.]

1. Constitutional Law—Statutes—Construction in Favor of Validity.—Where two constructions may be given a statute, one making it within the Legislature's power, and another not, it will be presumed that the Legislature intended to do that which it had the right to do.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 10, Constitutional Law, § 46.]

2. Eminent Domain—Railroads—Connections—Right to Compensation—"Private Property."—Code 1904, § 1294d, cl. 37, authorizes one railroad company to connect with another, and provides that the company making the connection must bear all expenses of operating the connection, etc., but does not require compensation to the company with which connection is made for the use of its property. Const. 1902, § 58 (Code 1904, p. ccxxii), prohibits a law whereby private property is taken or damaged for public uses without just compensation. Held, that since a railway right of way is private property even to the public, except as to an interest and benefit in its uses, the land of a company with which connection is sought cannot be taken upon which to construct the connecting track for joint use against its consent without compensation; the Code provision being subordinate, and not repugnant, to the constitutional provision.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5577-5578; vol. 8, p. 7764.]

3. Same.—Code 1887, § 1097 (Code 1904, § 1294b, cl. 4), reserving to the General Assembly the right to provide for connecting any work of internal improvement with any other such work, does not deprive a railway company, with which another company seeks to connect, of the right to compensation if its property is taken in making the connection.

4. Same—Eminent Domain—Compensation—Character.—No person or corporation can be compelled to take, as compensation for property taken, rights or interests, however valuable, in the taker's property or works, and no benefit, however great, resulting to the owner from the taking, can diminish the amount of compensation in money to which he is entitled; and hence a railway company, being entitled to compensation for property taken by another company in connection with it, is entitled to payment in money.

[Ed. Note.—For cases in point, see Cent. Dig., vol. 18, Eminent Domain, § 438.]

5. Same—"Taking."—To take from a railroad company the exclusive right to the use of its property, or any part thereof, and limit its use therein to a particular purpose, and give another railroad company an equal or joint right in the use of it for that purpose, is a "taking" within the meaning of Const. 1902, §§ 58, 159 (Code 1904, pp. ccxxii, cclviii).

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 6852-6860, 7813.]

HARVEY et al. *v.* HOFFMAN et al.

Sept. 15, 1908.

[62 S. E. 371.]

1. Ejectment—Judgment for Plaintiff—Recovery of Possession.—Code 1904, § 662, as amended by Act Dec. 12, 1903 (Acts 1902-4, p.